

GMO agriculture versus organic agriculture – Genetic trespass, a case study

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Abstract

Western Australia (WA) has maintained a moratorium on the growing of genetically modified crops since 2003. An exemption was granted in 2008, for growing GM cotton, only in a specified remote region of the state. A general exemption was declared in 2010 for growing GM canola anywhere in WA. In a public review, over 400 submissions were received by the government with over ninety percent arguing for retaining the ban on GM crops, while Monsanto, Dow Agrosiences and the Grain Research and Development Corporation argued for lifting the moratorium. Many submissions argued that segregation of GM and non-GM crops would fail and that the doctrine of "mutual co-existence" was unsafe. In the first year of GM canola in WA, the certified organic mixed farm of Steve Marsh was contaminated with GM canola seed which was allegedly dispersed from a neighbouring farm which had planted GM canola in 2010. Marsh lost his organic certification due to GM contamination. Marsh has sought redress by consensus and via the courts.

Introduction

Clause 12 of Monsanto's so called 'stewardship' agreement and signed by each of its customers for genetically modified (GM) seeds states that: "In no event shall Monsanto or any seller be liable for any incidental, consequential, special, or punitive damages" (Monsanto, 2010, p.4). It is a corporate ploy calculated to embrace the profits and eschew the problems - to Monsanto the profits, to farmers and consumers whatever the problems.

In Australia, it is the Office of the Gene Technology Regulator (OGTR), established in 2000, that approves the release of GM varieties, and currently only GM varieties of cotton, canola and rice are approved (OGTR, 2013). It is however the prerogative of the Australian states to allow or disallow any such plantings. With the exceptions of Queensland and Northern Territory, all states and territories have imposed moratoria on GM crops (DoA, 2008). Tasmania and South Australia maintain robust moratoria. NSW and Victoria allow GM canola.

Western Australia (WA) passed the Genetically Modified Crops Free Areas Act in 2003. In November 2008 WA exempted GM cotton in the Ord River irrigation area (ORIA) from the moratorium (WADAF, 2010). In January 2010 WA exempted GM canola from the moratorium. This was despite that the WA Department of Agriculture and Food (WADAF) admitted that "since the advent of GM canola in Canada farmers can no longer grow organic canola in Western Canada" (WADAF, 2010, p.2). The WADAF proposed some faith in, but no evidence for, the capacity for a "mutual co-existence of GM crops and organic farming" (p.2) and declared that "common law allows for effective remedies for persons incurring damage from GM crops" (p.3).

Genetically modified organisms (GMOs) are excluded from organic agriculture production (Paull & Lyons, 2008). However, the resistance to GM crops extends well beyond organic producers and consumers. GMOs remain under a multilayered cloud from skeptical consumers expressing resistance and rejection, and that due to a lack of labelling, concerns over health and safety, concerns of genetic contamination and the irreversibility of release, suspicion of crops that are patented by pesticide multinationals and are marketed in conjunction with prescribed herbicides, concern that farmers cannot save seed and are beholden to multinationals, that biodiversity is reduced, and there is the concern that GM multinationals reap all the profit while dispersing all the risk.

The introduction of GM canola to WA has had an immediate impact on two neighbouring WA farmers who are locked in a legal tussle over GM contamination of a certified organic farm that has been decertified due to GM contamination (Martin, 2013). This paper examines the context, the progress and the ramifications of that GM contamination and the pursuit of common law remedies.

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Material and methods

The present account draws on court documents, Parliament transcripts and other documents to track the introduction and the aftermath of the release of GM canola into WA, and in particular the fate of the certified organic farm at Kojonup, Western Australia, of Steve Marsh, and his ongoing efforts to seek remedies and recompense for harms and damages due to the genetic trespass of GM canola.

Results

The WA Minister for Agriculture and Food, Terry Redman, announced on 25 January 2010 a relaxation of the WA moratorium on GM crops. GM canola varieties modified to withstand the herbicides triazine, imidazolinone and glyphosate were exempted from the provisions of the Genetically Modified Crops Free Areas Act 2003 (WADAF, 2012, p.1).

Prior to the relaxation of the moratorium, the WA Government was warned in submissions and petitions that GM contamination and non-containment were issues of concern. "The great majority" (over 90%) of submissions to the review of the Genetically Modified Crops Free Areas Act 2003 were pro-moratorium (Calcutt, 2009, p.13). Such submissions made the point that: "Contamination from GM crops is inevitable and segregation of GM seed is impossible so the ban on growing GM crops must be retained to preserve the State's 'clean green' image and protect the status of producers marketing their produce as 'organic'" (Calcutt, 2009, p.16).

Petitions signed by more than 25,000 people were submitted to the Western Australia Parliament (Murray, 2010, p.471). Petitioners specifically identified the issue of the risk of organic farmers losing their certification:

"We, the undersigned, say that as Genetically Modified (GM) canola seeds and pollen cannot be contained, the decision to allow commercial growing will invariably contaminate all non-GM crops. If contaminated with GM, non GM farmers will lose their markets, organic farmers will face loss of certification and consumers will not be able to actively avoid GM foods because of current inadequate labelling regulations. Now we ask the Legislative Assembly to revoke the decision on allowing commercial growing of GM canola in Western Australia and renew the moratorium on GM crops in this state" (Murray, 2010, p.471).

Monsanto had apparently anticipated the lifting of the moratorium by offering Roundup Ready GM canola seed in 2009 (Murray, 2009). Michael Baxter, a farmer of Kojonup, 250 km southeast of Perth, took advantage of Monsanto's seed offering and planted GM canola on or about Anzac Day 2010 (viz. 25 April). By November 2010, on the neighbouring organic farm, Steve Marsh detected stray canola on his property. Testing proved it to be GM canola. He notified his organic certifier the National Association for Sustainable Agriculture Australia (NASAA) as well as the WA Department of Agriculture and Food. NASAA withdrew organic certification from the contaminated 325 hectares (out of 478 ha.) of the Marsh farm.

For the next two growing seasons, 2011 and 2012, Marsh and Baxter agreed (in 2011) that Baxter would maintain a buffer zone of 1.1 km between his GM canola and Marsh's farm. In April 2012 Marsh initiated legal action against Baxter for loss and damage. For the 2013 planting, Baxter indicated his intention to reduce the previously agreed buffer distance of 1.1 km to 300 metres. This precipitated an application from Marsh for an interlocutory injunction to stop Baxter planting GM canola within 2.5 km of the Marsh farm (Eagle Rest) and to stop the harvesting by Baxter's preferred method of swathing (Martin, 2013).

In response to the application for the injunction, Baxter undertook to not harvest by swathing, a harvesting method which disperses more material than alternative methods, and Marsh's lawyer's relented on the 2.5 km buffer and instead sought to reinstate the prior 1.1 km consensual buffer for the 2013 growing season. In contrast, the Monsanto licence requires a 5 metre buffer zone. The injunction however failed for want of evidence with the judge commenting that: "they express opinions, without a requisite basis in expertise ... in my view, it is unconvincing, as regards the present efforts to impose a buffer zone of beyond the given 300 m" (Martin, 2013, para.51).

The case of Marsh v Baxter is scheduled for a trial early in 2014, is expected to last two to three weeks, and to conclude prior to the 2014 canola planting season. In the meantime the bulk of the Marsh farm remains decertified since 2010 with the presiding judge stating that "The only consequence for the plaintiff is economic" (Martin, 2013, para.27) and the evidence regarding the future prospect of regaining certification is "somewhat speculative" (para. 35).

The Judge observed that a statement of "the plaintiff's claimed damages in the period 2010 and there after ... has not been filed with the court ... there is no such document" (Martin, 2013, para.36). The Judge

accepted that Baxter had "some very plausible and legitimate reasoning for wanting to grow GMC [GM canola] ... to address that weed problem by growing GMC in 2013 in the paddocks, then subsequently applying a herbicide Roundup, in order to tackle the rye grass weed problem" (para.38).

There has been little joy for Marsh as the plaintiff in the years since the initial GM contamination with perhaps the exception that the Supreme Court Judge has recognised that "this tort case falls into a somewhat pioneering class of case" and that it is "factually somewhat novel" (Martin, 2013, para.30) and that it "is unlike prior cases known to the law" (para.28) with the implication that this be a land mark case which can potentially create new law with broader food and agricultural implications.

Discussion

None of the issues besetting Steve Marsh's farm were unanticipated in the submissions to the review of the WA moratorium on GM crops, and to date none of them have been resolved. The five metre buffer zone between GM and non-GM crops is demonstrably inadequate. Remedies under the law can be cumbersome, slow, challenging, and expensive, and in this case they pit farmer versus farmer, and the high cost of lawyers together with the risk of losing and having costs awarded mean that the farm is 'on the line' in such an action. The farm of Steve Marsh has not achieved a reinstatement of its certified organic status. The case has been legally framed as an issue of nuisance and negligence. The case offers some potential to explore the topic of genetic trespass, the intrusion of genes into a property, in the present case causing immediate harm to the owner or occupant, and the intrusion of novel genes into the commons. The case of Marsh v. Baxter presages forthcoming challenges to organic standards and certification, and will throw some light on the practicality of the doctrine of mutual coexistence and, more generally, the continuing viability of organic production.

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